In The

United States Court of Appeals

EIGHTH CIRCUIT

September Term 1954.

No. 15,283.

CIVIL.

George H. Brasier, APPELLANT,

V.

United States of America; H. V. Higley, Administrator of Veterans Affairs, Veterans Administration, Washington, D. C.; Ted Martens Chief of Vocational Rehabilitation and Education Division, Veterans Administration, Lincoln, Nebraska; Freeman B. Decker, Superintendent of Public Instruction, Lincoln Nebraska; Wayne O. Reed, former Superintendent of Public Instruction, Lincoln, Nebraska and Otto G. Ruff, former Supervisor of Veterans Education, Lincoln Nebraska, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION.
Hon. John W. Delehant, District Judge.
Filed February 5, 1955.

PETITION FOR REHEARING.

GEORGE H. BRASIER,
Pro se,
HERBERT W. BAIRD,
138 N. 12th Street,
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Attorneys for Appellant.

PETITION FOR REHEARING.

Comes now the appellant, George H. Brasier, pro se, and moves the court to vacate its opinion and judgment in the above entitled cause and to grant a rehearing en banc on the merits for the following reasons as hereinafter set forth.

In the event this petition is overruled the appellant requests the mandate be witheld for 60 days from the date of said ruling in which appellant may apply for and prepare a record for appeal to the Supreme Court of the United States of America.

REASONS.

1. The court erred in overlooking the fact that appellant specifically pleaded in his complaint to-wit: (R., p. 56).

> "Further, this action arises under the Constitution of the United States, Section 10, Article I, the Fifth and Section 1 of the Fourteenth Amendments thereof, as against Public Law 266, 81st Congress and the subsequent acts of the Defendants, as herein more fully appears."

Conclusions of law in support of above:

In *Heald* v. *District of Columbia,* 254 U. S. 20, 23 (1920) it was held in effect that the right to pass on the constitutional power of Congress draws to it the authority also to decide all the essential incidents, even though there might not be a right to consider them.

In *Marbury* v. *Madison,* 1 Cr. 137, 178 (1803) Justice Marshall said:

> "If the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act, must govern the case which both apply."

In *Osborn* v. *Bank of United States,* 9 Wheat. 738, 819, 823 (1824) it was held in effect that where Federal jurisdiction is dependent upon the charactor of the cause, it is sufficient that one of the ingredients is a question to which the judicial power is extended by the Constitution, and it is immaterial that other questions of law and fact are involved.

2. The court erred in overlooking the fact that judicial power and duty under Article III, Section 2, Clause 2 is equated with the due process clauses of the Fifth and Fourteenth Amendments of the Federal Constitution; that appellant specifically pleaded in his complaint to-wit:(R., p. 58).

> VII. "The deprivation of franchise and contract, which is in effect, a taking of property without just compensation and without due process of law and violates the Fifth and Fourteenth Amendments of the Constitution of the United States."

Conclusion of law in support of above:

In *Crowell* v. *Benson,* 285 U. S. 22; 56-57 (1932) Chief Justice Hughes elaborated:

> "* * * whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative

agency * * * for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend." To do so, contended the Chief Justice, "would be to sap the judicial power as it exists under the Federal Constitution and to establish a government of a bureaucratic character alien to our system, wherever constitutional rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

For further conclusions of law on this point see reply brief of appellant, page 3. Appellant makes same a part hereof by reference.

3. The court erred in overlooking the fact that Sections 11a-2 and 705 of Title 38 U. S. C. A. have never at any time been controverted by the herein appellant (R., p. 59).

See conclusions of law referred to on pages 7, 8 and 9 of appellant's original brief. Appellant makes same a part hereof by reference.

4. The court erred in overlooking the fact that an attempt has been made by this honorable court to adjudicate and determine the instant controversy against the herein appellant without benefit of due process of law i. e., a full hearing that includes the right to introduce evidence, in fact a complete trial. Appellant is prepared to prove by conclusive evidence that the appellees, both Federal and State, violated appellant's vested rights guaranteed by the Federal Constitution.

The evidence will show conclusively that appellant's institution was formally approved as being an institution

in operation for a period of one year in order to qualify said institution to train eligible veterans. This occured on November 15, 1948, by the coordinated efforts of the Veterans Administration, Federal Appellees and the Department of Public Instruction, State Appellees, subsequently the Veterans Administration entered into a valid contract with appellant on the 17th day of January, 1949, covering a period from January 15, 1949, to June 30, 1949, then extended said contract on the 6th day of September, 1949, to cover a period from July 1, 1949 to June 30, 1950. The evidence will conclusively show many other violations of appellant's vested rights. What the appellant wants and needs is soley jurisdiction guaranteed by the law of the land (R., p. 14; R., p. 56; R., pp. 6-14).

5. The court erred in overlooking the fact that the Administrator of Veterans Affairs, "had he been served or appeared, and he not being within the jurisdiction of the court, but having his subordinates there, who, it was alleged, were violating the law or about to violate it, upon a proper showing an injunction could issue against them."

Brougham v. *Blanton Mfg. Co.*, 243 Fed. 503 (This Court).